

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 324

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| In the Matter of |) | |
| |) | |
| PORTLAND GENERAL ELECTRIC COMPANY, |) | CITY OF GRESHAM’S CROSS-RESPONSE BRIEF |
| |) | |
| Advice No. 17-05 (ADV 523), Schedule 134 |) | |
| Gresham Privilege Tax Payment Adjustment |) | |
| _____ |) | |

I. INTRODUCTION

The City of Gresham (“Gresham” or the “City”) urges the Public Utility Commission of Oregon (the “Commission”) to reject Portland General Electric Company’s (“PGE’s”) Advice No. 17-05 and Schedule 134 Gresham Privilege Tax Payment Adjustment (“Advice No. 17-05”). Advice No. 17-05 amounts to retroactive ratemaking, is ineligible for any statutory exception, undermines the City’s taxing authority, and will harm PGE’s current and future customers in Gresham.

Gresham agrees with Staff that PGE’s arguments are difficult to follow, and poorly supported; however, the relevant facts and law at issue in this proceeding that support rejecting PGE’s filing are simple. First, Gresham lawfully imposed a tax increase prospectively in 2011, as confirmed by the courts. Second, PGE did not seek deferred accounting, fully pay its taxes, or collect the tax increase from its ratepayers during the appeals process. Third, PGE now seeks to charge its ratepayers, but has failed to provide a legal basis to allow prospective recovery to compensate for its past under-collection.

II. ARGUMENT

A. Gresham Lawfully Imposed a Prospective Tax Increase in 2011

Although Staff ultimately agrees with Gresham, it also credits PGE with arguments that PGE has not expressly made. For example, PGE has not clearly articulated whether it believes the overdue taxes were lawfully imposed by Gresham, by the Circuit Court or by either appellate court. Likewise, PGE inconsistently argues the legal effect of certain court orders without addressing the legal effect of other orders. Staff attempts to harmonize PGE's inconsistent arguments by suggesting that PGE means that a variety of actors collectively imposed the tax. Although Staff ultimately confirms that Gresham (and Gresham alone) imposed the tax increase in 2011, PGE's filing should be rejected because of its failure to clarify who imposed the taxes, whether it believes the fees were imposed collectively, or how each court order affected its ability to collect Gresham's tax increase.

B. PGE's Request Amounts to Impermissible Retroactive Ratemaking

Both the Citizen's Utility Board ("CUB") and Staff agree that Advice No. 17-05 requests authority to engage in unlawful retroactive ratemaking. CUB notes, "[t]here can be little doubt that PGE's attempt to recover taxes from current Gresham customers, that would have been paid by 2012 Gresham customers, is 'retroactive' and constitutes prohibited retroactive ratemaking."¹ Staff explains that "the Commission has no legal authority to allow PGE to retroactively recover" these taxes because Gresham imposed its tax increase prospectively.²

¹ CUB's Brief at 4.

² Staff's Brief at 2.

1. ORS 757.259(1) Does Not Apply

Staff points out that ORS 757.259(1) is “plainly worded and, as such, is easily applied as written.”³ CUB adds that PGE’s arguments conflict with the plain language of ORS 757.259(1), and the Commission’s previous orders applying ORS 757.259(1).⁴ The easy application of the statute does not permit PGE to recover under ORS 757.259(1).

Staff attempts to rehabilitate PGE’s arguments, and suggests that PGE seeks to rewrite the statute to mean “legally obligated to pay as a result of government action.”⁵ First, PGE never clearly articulated that position. Second, as Staff points out that position is not supported by the plain language of the statute or its legislative history. And as CUB points out, PGE’s overall position is not supported by prior Commission decisions either. There is no need to re-draft PGE’s arguments. The Commission should instead simply reject PGE’s filing.

Although Staff seems willing to accept that Gresham may be a “governmental agency” under ORS 757.259(1), it concludes that the Commission need not make this determination in the present case because ORS 757.259(1) does not apply because Gresham’s tax was not retroactively imposed.⁶ Likewise, Staff notes that it is not necessary to consider whether a court may be a governmental agency, “because it is manifestly clear that the Resolution increasing the privilege tax was lawfully imposed by the *City*, not the state courts.”⁷ Gresham agrees that the correct approach is to reject PGE’s filing based on the fact that the tax was prospectively imposed, and there is no

³ Id. at 6.

⁴ CUB’s brief at 5-6.

⁵ Staff’s Brief at 4.

⁶ Id. at n.2.

⁷ Id. at 9.

need to address other issues.

2. OAR 860-022-0040 Does Not Apply

The Commission's rules do not expressly allow PGE to retroactively collect from its customers. Staff points out that the Commission's rules cannot require retroactive collection without express statutory authorization, which is lacking.⁸ Thus, Staff concludes that the only lawful application of OAR 860-022-0040 would be on a prospective basis. Gresham shares Staff's concerns as to the legality of the Sherwood charges PGE relied upon, but notes that it does not have access to all of the facts of that matter, that the available facts are easily distinguishable, and therefore the Sherwood matter does not provide precedent to support PGE's current filing. In sum, because Gresham's overdue taxes were imposed prospectively in 2011, PGE should not be permitted to recover them prospectively in 2017.

3. The Colstrip Matter is Not Applicable

Staff is correct that the facts of the Colstrip matter do not support PGE's argument. Overall, the facts of this matter as well are not entirely clear from the documents that PGE uses to support its position. Although the legality of this retroactive application also appears questionable, the available facts are again distinguishable as explained in both Staff's and Gresham's briefs, which means that PGE does not have any precedent to support its current filing.

C. Recovery Under ORS 757.259(1) is Subject to an Earnings Test

Although Gresham does not believe that ORS 757.259 permits recovery in this

⁸ Id. at 10-11.

situation, CUB is correct that any such recovery would be subject to an earnings test.⁹ According to the Commission, “[t]he test ensures that utilities do not receive extraordinary relief through retroactive ratemaking for additional costs incurred when their overall earnings are sufficient. Conversely, the test ensures that utilities are not to refund amounts to customers while earnings are below reasonable levels.”¹⁰

In 2013, the Commission issued two key orders interpreting the earnings test required by ORS 757.259. First, the Commission concluded that amounts under ORS 757.259(1), unlike those under ORS 757.259(2), did not require a preliminary deferred accounting order to make them subject to amortization.¹¹ Next, the Commission concluded the statute requires the application of an earnings test when amortizing amounts under either ORS 757.259(1) or ORS 757.259(2).¹² Thus, before permitting any recovery under ORS 757.259, the Commission must determine whether PGE’s overall earnings are sufficient and whether all or a portion of the amounts should be recovered.

The Commission has a certain degree of discretion in determining whether PGE’s earnings permit recovery under ORS 757.259. For example, selecting which years should be reviewed and whether the Commission should apply an earnings test on an annual or average basis will depend on the unique circumstances of each application. Gresham reserves the opportunity to address these issues more thoroughly, should the Commission determine recovery under ORS 757.259 is appropriate.

⁹ CUB’s Brief at 6.

¹⁰ Re Idaho Power Company Request for General Rate Revision, Docket No. UE 233 (Phase II), Order No. 13-416 at 12 (Nov. 12, 2013).

¹¹ Re of Idaho Power Company Deferral of Recognized Tax Benefits, Docket Nos. UM 1562/UM 1582, Order No. 13-160 at 8 (Apr. 30, 2013).

¹² Docket No. UE 233 (Phase II), Order No. 13-416 at 2-6.

III. CONCLUSION

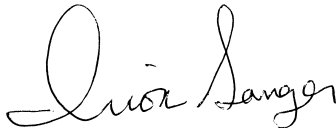
For the reasons stated above, the Commission should reject PGE's request to allow Advice No. 17-05 and should not permit Schedule 134 to go into effect on July 1, 2017.

Dated this 13th day of June 2017.

Respectfully submitted,

/s/ David R. Ris

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